



Administrative Tribunal

Distr.  
LIMITED

AT/DEC/767  
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 767

Case No. 851: NAWABI

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding;  
Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas at the request of Ehsan U. Nawabi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 March 1995;

Whereas, on 31 March 1995, the Applicant filed an application requesting the Tribunal, inter alia:

" [To hold oral proceedings, and]

- (a) To rescind the decision of the Secretary-General not to extend the Applicant's contract beyond 15 October 1993;
- (b) To order the Applicant's immediate reinstatement with payment of full salary and applicable allowances and benefits from the date of his separation from service to the date of his reinstatement;

...

- (f) To award the Applicant additional appropriate compensation to be determined by the Tribunal on the basis of the Applicant's statement of losses for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

- (g) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case;
- (h) To award the Applicant as costs, the sum of \$5,000.00 in legal fees and \$500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 9 January 1996;  
Whereas the Applicant filed written observations on  
9 February 1996;

Whereas, on 2 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 10 July 1996, and on which the Applicant submitted comments on 12 and 22 July 1996;

Whereas, on 3 July 1996, the Tribunal put questions to the Applicant, to which he provided answers on 8 and 9 July 1996;

Whereas, on 4 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

On 20 January 1992, the Assistant Chief, Professional Staffing Service (PSS), Office of Human Resources Management (OHRM), offered the Applicant a one year fixed term appointment, at the P-3 level, as a Civil Engineer with UNDOF. The appointment was to be "limited strictly to your service with UNDOF." On 4 February 1992, the Applicant accepted the offer.

On 28 February 1992, the Chief Administrative Officer, UNDOF, cabled the Chief, Field Personnel Section, Field Operation Division (FOD), as follows:

"UNDOF now finalizing restructural preparations to achieve fifteen percent budget savings. We are planning to send proposal to HQ [Headquarters] not later than 15 March. If suggested proposals will be approved by HQ NY the post of Civil Engineer is not going to be needed. Would, therefore, suggest to postpone decision on recruiting Civil Engineer until UNDOF future organization has been decided on."

In a reply dated 29 February 1992, the Chief, Field Personnel Section, FOD, stated:

"PRIMO Pleased to advise [the Applicant] now accepted offer and medically cleared for Civil Engineer post. We are attempting to foreshorten period of notice required by employer and will revert.

"SECUNDO Your 224 on budget savings received. Please note that we shall not be proceeding with suggestion contained therein."

In a cable dated 2 March 1992, to FOD, UNDOF reiterated its suggestion that the assignment of the Civil Engineer to UNDOF should be postponed "until future reorganization had been decided on by HQ New York", as an engineer would no longer be required in UNDOF, if the proposals for reduction were accepted.

On 2 March 1992, the Chief, Field Personnel Section, FOD, requested the U.S. Army Corps of Engineers, the then employer of the Applicant, for his earliest possible release. On 9 March 1992, the U.S. Army Corps of Engineers advised the Chief, Field Personnel Section, FOD, that, although normally the Applicant would only be able to terminate his employment with effect from 30 June 1992, "Nevertheless, in consideration of your request and [the Applicant's] interest to join you soon, I have specified 31 March 1992 as the date of termination of [the Applicant's] employment."

On 17 March 1992, the Secretary-General approved UNDOF's plans to streamline operations. These included the abolition of the post of Civil Engineer which had been offered to and accepted by the Applicant.

The Applicant entered the service of the United Nations Disengagement Observer Force on 16 April 1992, on a one year fixed-term appointment as a Civil engineer at the P-3, step V level. On the same date, he arrived in Damascus, and on 21 April 1992, he reported for duty at UNDOF. At this time, he was informed by the Personnel and Travel Officer, that he had not been expected in Damascus, as the post of Civil Engineer had been abolished.

On the same day, the Applicant recorded, in a note for the file, the contents of his meeting with the Chief Administrative Officer. He sent a copy of the note to the Chief, Field Personnel Section, FOD. In this note, he expressed concern that he had "joined the UN in pursuit of a rewarding career advancement but, not to subject myself to uncertain employment conditions or my children to inferior educational standards." He noted that he had resigned a permanent position based on the offer and understanding that he would be working for at least one year as an engineer for UNDOF in Damascus; that based on satisfactory performance, the employment contract would be extended, and that suitable educational facilities existed in Damascus. He concluded by requesting that if he was to be considered for reassignment "I wish to be kept informed and consulted about the developments".

On 4 May 1992, the Applicant was assigned to UNDOF as Buildings Management Officer in the General Service Section. In a letter dated 30 June 1992, the Applicant informed the Assistant Chief, PSS, OHRM, that the post of Buildings Management Officer "requires neither professional nor engineering qualifications." He stated that "after resigning my employment in Germany, I had no choice but to proceed with the BMO [Buildings Management Officer] function as directed." He noted that "this was not the function for which I resigned a professional permanent post with the U.S. Government in Europe and arrived here to join the UN".

On 15 September 1992, the post of Buildings Management Officer was abolished. On the same day, the Applicant was informed of his reassignment to the Procurement Section, with effect from 16 September 1992. On 22 September 1992, the Applicant expressed his concern to the Assistant Chief, PSS, OHRM, about his career.

On 22 March 1993, the Chief Procurement Officer, UNDOF, proposed to the Chief Administrative Officer, UNDOF, that the Applicant's appointment be renewed for six months. On 23 March 1993, the Chief, Administrative Officer, UNDOF, informed the Chief, Field Personnel Section, FOD, inter alia, that "... we might find it

difficult to recommend further extension of [...] [the Applicant's] fixed-term appointment beyond six months ..."

On 31 March 1993, the Chief Administrative Officer, UNDOF, forwarded to the Chief, Field Personnel Section, FOD, the Applicant's Performance Evaluation Report, with an overall rating of a "very good performance".

On 8 April 1993, the Chief, Field Personnel Section, FOD, agreed to a six-month extension of the Applicant's fixed-term appointment. He requested that the Applicant be informed that "there would be no further extension beyond 15 October 1993." On 13 April 1993, the Applicant was so informed. He signed his Letter of Appointment on 10 May 1993, "with reservations".

On 22 April 1993, the Applicant wrote to the Director, FOD, requesting his assistance in resolving his situation. On 31 August 1993, the Chief Administrative Officer, UNDOF, informed the Applicant that there would be no further extension of his appointment, which would expire on 15 October 1993.

On 8 September 1993, the Applicant requested the Secretary-General to review the decision not to renew his fixed-term appointment beyond 15 October 1993. On 1 October 1993, the Applicant lodged an appeal against that decision with the Joint Appeals Board (JAB). At the same time, he requested a suspension of the administrative decision not to renew his fixed-term appointment. The JAB recommended granting the Applicant's request for suspension of action. On 14 October 1993, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided not to grant his request for a suspension of action.

The Applicant separated from service on 15 October 1993.

The JAB adopted its report on the appeal on 28 June 1994. Its considerations, conclusion and recommendations read, inter alia, as follows:

### "Considerations

23. The Panel quickly concluded that this was a case of non-observance by Respondent of Appellant's terms of employment. He was offered and accepted a post as a Civil Engineer. Respondent was fully aware before the date Appellant was due to leave his previous employment that the post he had been offered no longer existed, but no effort was made to so inform him and to give him the possibility of re-evaluating the offer of appointment. Having been negligent in this, Respondent proceeded to compound his error. Upon Appellant's arrival in Damascus, Respondent should have considered, and discussed with Appellant, the option of termination for abolition of post. There is no evidence that this was done.

...

25. On 16 September 1992, Appellant was assigned to another function for which he was even more patently overqualified. On 15 October 1993, after a six-month extension of his fixed-term appointment, he was separated from United Nations service. There is no indication that he manifested anything but good will to the United Nations as his employer throughout his brief career. There are indications that several United Nations officials assured him that, given satisfactory performance on his part and the availability of a suitable vacancy, he could expect continued employment with the United Nations. His one PER was for 'a very good performance.'

26. The Panel decided that Respondent could legitimately be charged with breach of contract and with negligence, if not impropriety, in this case. Appellant had, no doubt, been harmed, but the Panel was at least as concerned with injury to the United Nations itself. Any potential recruit to the United Nations hearing the facts of this case would indeed be foolish to accept a fixed-term appointment with the Organization. If steps are not taken to rectify such situations - instead of attempting to defend and justify them, the United Nations may one day find that it can no longer recruit and retain competent professionals.

### Conclusion and Recommendations

27. The Panel ... concludes that Appellant has suffered monetary, psychological and professional injury, but it does not feel that it - or anyone else, for that matter - can establish an exact dollar value for the injury suffered by Appellant and, in all probability, his children. The recommendations made below constitute, however, a minimal appropriate compensation.

28. The Panel recommends that:

(a) Appellant be issued a certificate of service which reflects the evaluation in his PER [performance evaluation report], and states that his separation was occasioned solely by the needs of the service and should in no way be considered as a negative reflection on his qualifications and competence; and

(b) he be paid 18 months net base pay (dependency) at level P-3, step VI."

On 10 August 1994, the Officer-in-Charge, Department of Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided to accept the JAB's recommendations.

On 31 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the requirement of full disclosure by not informing the Applicant of the likelihood that his post would be abolished or that it had been abolished, prior to his relocation to Damascus.

2. The Respondent unilaterally amended the terms and conditions of the Applicant's contract of employment and did nothing to address the long term effects of the breach of that contract.

3. The compensation recommended by the JAB falls short as a remedy for the harm done; therefore, the Applicant should be awarded actual damages as well as punitive damages to deter further similar abuses of authority.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed pursuant to a fixed-term appointment which carried no expectancy of renewal and which expired on its own terms.

2. The Applicant has adduced no evidence that the decision not to extend his fixed term appointment was improperly motivated or tainted by extraneous considerations.

3. The decision to award the Applicant 18 months net base salary as compensation for the serious irregularities in the recruitment of the Applicant was a valid exercise of discretion.

The Tribunal, having deliberated from 2 to 26 July 1996, now pronounces the following judgement:

I. The Applicant gave up his position with the United States Army Corps of Engineers in Frankfurt in order to take up his United Nations posting. Although this was a one-year, fixed term appointment, the Applicant makes the point that he had been told by the Chief of Field Personnel Section, FOD, that there were long-term prospects of continuing service at UNDOF, or elsewhere, in the United Nations.

II. The Applicant accepted the offer of appointment on 4 February 1992. On 28 February 1992, the question arose of the abolition of the Applicant's post, for budgetary reasons. Despite this, at the Organization's request, the date of termination of the Applicant's service with the United States Army Corps of Engineers was advanced to 31 March 1992. It was only on his arrival in Damascus, on 16 April 1992, that the Applicant was told that his post had been abolished, by a decision made on 17 March 1992. To add to his uncertainty, he was told to remain on travel status, pending clarification of the situation.

The Applicant was appointed to another post, which was also abolished on 15 September 1992. He was then appointed to yet another post, in the Procurement Section, which the Applicant

describes as being that of a trainee. The Applicant separated from service, on 15 October 1993, following one six-month extension of his appointment.

III. The Respondent argues that, in accordance with Staff Rule 104.12(b), the fixed-term appointment does not carry an expectancy of renewal, or of conversion to any other type of appointment. The Respondent also refers to the two fixed-term contracts signed by the Applicant, which stated that they did not carry any expectancy of renewal or of conversion. The Respondent further argues that a claim of renewal can only be valid if it is based on a firm commitment of renewal, revealed by the circumstances of the case, and these circumstances must be exceptional. He says that such circumstances are lacking in this case.

The Respondent also argues that, as the decision to renew a fixed-term contract is within the discretion of the Secretary-General, it can be challenged only if it is arbitrary, or tainted by caprice, prejudice, falsehood or any other extraneous factor. He contends that there is no evidence of improper motivation or extraneous considerations.

The Respondent states that the reason for non-renewal of the Applicant's appointment was the abolition of his post.

IV. While it is correct that the fixed-term appointment does not carry any expectancy of renewal or of conversion, the Tribunal notes that the Applicant left a career position to join the service of the Organization, having been told, not just once, that the prospect existed of continuation of his service, and that subject to satisfactory performance, he might have the opportunity of a career with the United Nations.

After the post had been abolished, the Respondent persisted in active recruitment of the Applicant, leading him to believe that there were career opportunities, as well as a post, in his field of

expertise. The Respondent knew, at the time of recruitment, that career opportunities for the Applicant had been virtually eliminated.

V. It is difficult, indeed impossible, to avoid a finding of falsehood and of great injustice, based on the fact that the Respondent allowed the Applicant to give up an alternative career, on the assumption that there was a genuine, secure one-year post awaiting him in Damascus, when the Respondent knew that this patently was not so.

VI. While the Tribunal agrees with the findings of the JAB, it concludes that, because of the egregious circumstances obtaining in this case, the Applicant should be awarded greater damages. Such circumstances include the entire manner in which the Applicant was treated from the outset, as well as the extent of the loss suffered by the Applicant as a consequence.

VII. The post which the Applicant held with the United States Army Corps of Engineers was a secure post with all its attendant benefits. He gave up this post on the assumption that he had been appointed to an existing United Nations position. Not only was the Applicant not told that this post had been abolished, but the Respondent expedited the Applicant's release from his United States Army employment. Had this not been done, the Applicant might have been spared the difficulties he faced with regard to his United Nations appointment. The Applicant should have been informed of the developments relating to the post for which he was recruited. It is reasonable to assume that, had he been so informed, he would not have taken the drastic step of resigning. Because of the Respondent's behaviour, the Applicant was denied a real choice between remaining in his post, or of resigning to face a very uncertain future. The security which the Applicant once enjoyed is gone and cannot be restored.

VIII. The Tribunal put questions to the Respondent in an effort to understand why the recruitment of the Applicant proceeded at all, why it proceeded on an expedited basis, and why the Applicant was not properly informed of the situation. The Tribunal also requested information as to what subsequent investigation, if any, was undertaken with regard to those responsible for these decisions, which were costly for the Organization, and much more costly for the Applicant.

The answers received by the Tribunal can only be characterized as cavalier. They suggest an apparent lack of realization of the seriousness of the harm suffered by the Applicant. There has apparently been no attempt to discipline those responsible. In answering the Tribunal's question in this regard, the Respondent merely says that there is a new procedure, expediting the process and facilitating better coordination in the recruitment of staff for field missions. This is an inadequate response in the light of what occurred.

IX. The non-renewal of the Applicant's appointment is not a violation of his right to expectancy of such renewal. Rather, it is a denial to the Applicant, during his short tenure with the Organization, of any opportunity to demonstrate his abilities in a post relevant to the skills and experience for which he had been recruited, on the promise that there was a possibility of a career with the Organization. This promise, which induced him into service, was entirely without foundation. No explanation has been offered as to why it was made, or of the motivation of those who made it.

X. For the foregoing reasons, the Tribunal:

A. (1) Rescinds the decision of the Respondent dated 15 October 1993;

(2) Orders that the Applicant be reinstated to a post comparable to that for which he was recruited, with full payment of salary and emoluments from the date of his separation, less his earnings from other employment in the interim.

B. Should the Secretary-General, within 30 days of the notification of this judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary at the rate in effect on the date of his separation from service, in addition to the sum already paid to the Applicant, on the recommendation of the JAB.

All other pleas are rejected.

(Signatures)

Hubert THIERRY  
Vice-President, presiding, *Hubert Thierry*

Francis SPAIN  
Member *Francis Spain*

Deborah Taylor ASHFORD  
Member *Deborah Taylor Ashford*

Geneva, 26 July 1996

*R. Maria Vicién-Milburn*  
R. Maria VICIEN-MILBURN  
Executive Secretary



**Administrative Tribunal**

Distr.  
LIMITED

AT/DEC/768  
26 July 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 768

Case No. 823: SHARSHARA

Against: The Commissioner-General  
of the United Nations  
Relief and Works Agency  
for Palestine Refugees  
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Hubert Thierry, Vice-President, presiding;  
Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 2 November 1994, on behalf of Mohammed Mohyiddin Sharshara, a deceased former area staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), hereinafter referred to as "the Agency", I'tidal Mohammed Qaddoura Sharshara, his widow, filed an application requesting the Tribunal, inter alia, to order:

"a. Payment of [a] disability benefit assessed on the basis of 100%, being a result of service incurred accident.

b. Payment of the termination benefits at the UN Operational rate of exchange available at the date of the accident, which resulted in the disability benefit, according to which the Respondent decided to terminate the late husband of Applicant on medical grounds, i.e. US\$ = LS 11.20 available on 14 April 1992 (accident date).

c. Payment of secretarial and legal counsel's fees estimated at US\$ 1,500."

Whereas the Respondent filed his answer on 29 September 1995;

Whereas the Applicant filed written observations on 29 January 1996;

Whereas, on 14 March 1996, the Respondent submitted an additional document and, on 8 April 1996, the Applicant provided her comments thereon;

Whereas, on 2 August 1996, the Tribunal asked the Applicant to provide documentary proof that she had succeeded to Mr. Sharshara's rights on his death, pursuant to article 2, paragraph (a) of the Statute of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant's late husband entered the service of UNRWA, on 2 February 1973, as an area staff member, as a Driver at the Grade 5 level, in the Syrian Arab Republic (SAR).

On 15 April 1992, the Applicant's late husband was injured at work, breaking his wrist. He was placed on sick leave, from 15 April 1992 through 26 January 1993. On 16 December 1992, a Medical Board concluded that "the [Applicant's late husband] is unfit for further services with the Agency as a Driver. He has developed permanent disability assessed by 16% of whole man". On 20 December 1992, the Field Health Officer concurred in the conclusions of the Medical Board.

On 10 January 1993, the Field Director, SAR, informed the Field Administration Officer, that, unless a post could be found for the Applicant's late husband, whose duties he could perform despite his disability, the Agency would have to terminate his services. In a reply, dated 10 January 1993, the Field Administration Officer advised the Field Director that there were no suitable vacant posts for the Applicant's late husband and that his services should, therefore, be terminated due to the service-incurred disability.

In a letter dated 11 March 1993, the Applicant's late husband requested the Field Director to calculate his disability benefit using the previous exchange rate of LS 11.20 to 1 US\$, instead of

LS 26.60 to 1 US\$. In a reply, dated 27 March 1993, the Deputy Field Director advised him, "I regret that it is not possible to accede to your request".

On 26 April 1993, the Field Personnel Officer, SAR, informed the Applicant's late husband that the Medical Board had concluded "that you are 'unfit for further service with the Agency,' therefore, your services will be terminated for health reasons under the provisions of Area Staff Rule 109.7, para. 5(c)".

In a memorandum dated 13 May 1993, the Applicant's late husband protested to the Field Director, as follows: "I was not informed of the assessment of my disability until 11 May 1993, when I was requested to sign a letter releasing the Agency of the consequences of the heart problem which I still suffer from. I, therefore, request that the report of the Medical Board be reviewed as none of the Board members was a cardiologist". He submitted with the memorandum a copy of a report from a cardiologist which stated that the Applicant's late husband "suffers a defect in a cardiac muscle".

In a further memorandum of the same date to the Field Director, the Applicant's late husband protested: "I had not been informed of the percentage of my disability determined by the Medical Board until 11.5.93, when I was requested to sign a letter releasing the Agency of any responsibility for the complications of the fracture of my left wrist, ... as the medical board did not include any member specialized in osteology surgery, therefore, I hope that another medical board be formed with a doctor specialized in osteology surgery among its members". With the memorandum, the Applicant's late husband submitted a medical report from a specialist in osteology surgery, which stated: "The injury will result in a permanent disability of 50% of the functions of the wrist".

On 25 May 1993, the Applicant's late husband repeated his request that a new medical board be established, with a specialist

in bone surgery. In a reply dated 2 June 1993, the Officer-in-Charge, Personnel, advised the Applicant's late husband as follows:

"... it is up to the Agency to determine whether or not a specialist's presence is deemed necessary in the membership of its medical boards as the case may warrant. In your case, where X-rays and other necessary medical reports were available, there was no need for the services of a specialist; nor particularly was there a need for a specialist to assess the disability as this task is carried out by the medical board in accordance with a special international assessment system which is adopted by the Agency."

In a letter dated 22 June 1993, to the Field Personnel Officer, the Applicant's late husband requested access to his medical file and to information on the rules governing the assessment of the extent of his disability. In a reply dated 18 July 1993, the Field Administration Officer informed him that the assessment was based on an international system adopted by UNRWA.

On 18 July 1993, the Applicant's late husband lodged an appeal with the Joint Appeals Board (JAB) relating to both the assessment of the degree of his disability by the Medical Board and the calculation of his benefits using the new exchange rate.

In May 1994, the Applicant's late husband died. His widow continued the appeal.

On 20 July 1994, the JAB adopted its report. Its evaluation, judgement and recommendation read as follows:

"III. EVALUATION AND JUDGEMENT

19. The Board examined all documents cited before it including all pertinent regulations and rules, particularly rules set out in Parts 3 and 6 of Personnel Directive A/6 governing compensation for injuries and medical boards procedures, and resolved that the Administration has acted in conformity with standing rules regarding the assessment of the percentage of disability incurred by the Appellant during Agency service.

By reference to the Report of the Medical Board convened on 16 December 1992, the Board noted that it states that the Appellant 'has developed permanent disability assessed by 16% of whole man'. In this context, the Board is of the opinion that it cannot substitute its opinion for that of a Medical Board as long as the pertinent rules and procedures have been complied with by the Administration.

The Board also took note of the two medical reports of the orthopaedic surgeons that are submitted by the Appellant and found that both reports indicate that the percentage of disability suffered by the Appellant is 50% (in one of the reports) and 60% (in the other) of the injured arm.

As for the Appellant's request that his termination benefits be calculated using the old exchange rate of US\$ 1 to LS 11.209, the Board took note of SAR Field Circular 17/92 dated 5 January 1992 which was effective from 1 January 1992 to 29 February 1992. In this context, the Board resolved that the said Circular does not apply to the Appellant's case, particularly that his accident took place on 15 April 1992 and his services were terminated on health grounds effective 26 September 1993 almost nineteen months after the expiry of the period of application of the Circular.

#### IV. RECOMMENDATION

20. In view of the foregoing, and without prejudice to the production of further oral or written evidence, the Board unanimously makes its recommendation to uphold the Administration's decisions appealed against; and, that the case be dismissed."

On 2 August 1994, the Officer-in-Charge, Headquarters, transmitted a copy of the JAB report to the Applicant, and informed her as follows:

"You will note that the Board found that the Agency's Administration acted in conformity with standing Rules regarding the assessment of the percentage of disability incurred by your late husband during Agency service. The Board also found that the SAR Field Circular, which exceptionally provided certain staff members who elected to take early voluntary retirement during the first two months of 1992 with the opportunity to have their retirement benefits calculated using the United Nations operational exchange rate of US\$ 1.00 to SYP 11.20, had no application in

your late husband's case, particularly since the accident in which he was injured took place on 15 April 1992, and his services were terminated on health grounds effective 26 September 1993, almost 19 months after expiry of the period of application of the Circular.

Based on the above, the Joint Appeals Board unanimously made its recommendation to uphold the Administration's decisions appealed against, and that your late husband's case be dismissed. I accept the findings and recommendations of the Board, and accordingly, the appeal stands dismissed."

On 2 November 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Medical Board which assessed her late husband's disability did not include an orthopaedic surgeon or a cardiac specialist.
2. A new Medical Board should be set up to assess the degree of disability of her late husband, which was 100 per cent.
3. The rate of exchange to be used should be that prevailing at the time of the accident.

Whereas the Respondent's principal contentions are:

1. UNRWA Area staff, like the Applicant's late husband, are not covered by Appendix D or its equivalent.
2. The Applicant's late husband was covered by Area Staff Rule 109.7 which entitled him to the payment of a disability benefit equal to 200 per cent of his final annual salary and cost of living allowance. In addition, he was entitled, under Area Staff Rule 106.4, to annual compensation, to be determined by reference to the worker's compensation or labour law in the SAR.
3. The rate of exchange applicable to all termination benefits, including the benefit payable to the Applicant's late husband, is that prevailing on the date of termination of service.

The Tribunal, having deliberated from 2 to 26 July 1996, now pronounces the following judgement:

I. The Applicant is the widow of an Area staff member. He had served with UNRWA since 1973, until his termination in September 1993, for health reasons. The Applicant's late husband died in May 1994. The Applicant, on her own behalf, seeks payment of a disability benefit awarded to her late husband, assessed on the basis of 100 per cent, arising out of a service-incurred injury. The Applicant's late husband fractured his left wrist in an accident during the course of his work. He was examined by a Medical Board, which decided that he was unfit to work for the Agency as a Driver, that he had "developed permanent disability assessed by 16 per cent of whole man". The Agency did not have any other suitable post for him.

II. The Applicant's late husband sought, and was refused, a new Medical Board containing a cardiologist and an orthopaedic surgeon. He submitted medical reports from orthopaedic specialists in which the degree of disability in his wrist and arm was assessed at 50 per cent and 60 per cent. His requests for access to his medical files prepared for the Medical Board, and information on the rules governing the assessment of his disability, were refused. He was told that it was for the Agency to determine whether a specialist's presence was deemed necessary in a Medical Board. In his case, it was said that, where x-rays and other medical reports were available, there was no need for the services of a specialist and, particularly, there was no need for a specialist to assess the disability, as this task was carried out by the Medical Board in accordance with a special international assessment system, adopted by the Agency.

III. The Applicant's claim to a 100 per cent disability is based on a provision in Area Staff Rule 106.4, paragraph 3, that the amount payable to an injured staff member shall be determined by reference to the worker's compensation law applicable in the Syrian Arab Republic. Syrian law provides for the payment of a lump sum, the amount of which is determined by the permanent impairment percentage of the injured worker. Under that law, the Applicant claims that, as her late husband's accident ended his service, there is entitlement to 100 per cent disability.

The Respondent contends that, while Area Staff Rule 106.4 provides that the amount of compensation payable shall be determined by reference to Syrian law, the determination of the clinical extent of the disability is a matter for the Respondent, pursuant to the Area Staff Regulations and Rules. Once the extent of the disability is determined, reference is made to Syrian law to calculate the compensation payable.

The Tribunal accepts this interpretation.

IV. The Tribunal finds, however, that when the result of the Medical Board's deliberations and findings can lead to the termination of a person's employment and will determine the extent of his subsequent disability payments, due process requires that the person, who is the subject of the Board's enquiry, should be allowed to present relevant evidence, particularly outside expertise, and to have it fully considered. To enable a staff member to present his or her case fully, he or she must also have access to his or her medical files and to information as to the rules on the basis of which the Board makes its findings and assessment. The Applicant's late husband should have been afforded this information.

V. While the Tribunal cannot substitute its judgement for the judgement of the Medical Board with regard to the assessment of

16 per cent, the Tribunal does find that the procedures of the Board were flawed and the Applicant's late husband was, thereby, denied due process.

VI. The Applicant also contends that the Respondent failed to make payment at the United Nations operational rate of exchange available at the time of the accident. The Applicant argues that separation benefits are paid in US dollars. There is some disagreement as to whether a more favourable rate of exchange was still in force at the time of the accident, but the Tribunal notes that this matter need not be resolved because the date of the accident is not the relevant date for this purpose. The Tribunal agrees with the Respondent's contention that the relevant date is 26 September 1993, the date of termination. There is no question as to the exchange rate on this date.

VII. For the foregoing reasons, the Tribunal finds in favour of the Applicant.

Because of the death of the Applicant's husband, further questions have to be determined.

The Tribunal is satisfied that, following the death of her husband, the Applicant was entitled to pursue the Appeal in her own interest and that of any other beneficiary of her late husband's estate.

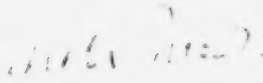
The documents furnished to the Tribunal, following the Tribunal's request under article 2, paragraph (a) of its Statute, indicate that the Applicant's late husband was survived by not only the Applicant, but also their children.

The Tribunal, therefore, orders that the sum of \$5,000.- be paid to the estate of the Applicant's late husband.

All other pleas, including the Applicant's request for costs, are rejected.

(Signatures)

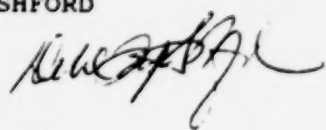
Hubert THIERRY  
Vice-President, presiding



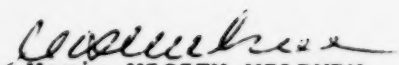
Francis SPAIN  
Member



Deborah Taylor ASHFORD  
Member



Geneva, 26 July 1996



R. Maria VICIEN-MILBURN  
Executive Secretary



Administrative Tribunal

Distr.  
LIMITED

AT/DEC/769  
2 August 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 769

Case No. 833: VAN UYE

Against: The Commissioner-General  
of the United Nations  
Relief and Works Agency  
for Palestine Refugees  
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding;  
Mr. Mikuin Leliel Balanda; Mr. Francis Spain;

Whereas, on 12 June 1994, Rolf van Uye, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (hereinafter referred to as "the Agency"), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 January 1995;

Whereas, on 12 January 1995, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"... to order or take the following measures or decisions:

A. To order the production by the UNRWA Administration of Annex F to the report of the International Staff Joint Appeals Board, report dated 25 February 1994, and of any

documentation or evidence related to the allegations which caused the decision of non-extension of appointment;

B. To order the rescission of the administrative decision, dated 12 February 1993, not to extend the Applicant's appointment beyond 29 May 1993; ...

C. To adjudge and declare that he was illegally denied his right to a five year extension, ...

D. To declare that the Applicant was not given the true reasons for the denial of further employment ...

E. To declare that the Applicant was illegally denied his right to be informed of any allegation made against him which caused the decision not to extend his appointment, and his right to respond to such allegations;

F. To order his reinstatement in UNRWA with a five year appointment;

G. Should the Secretary-General decide, in the interest of the U.N., that the Applicant should be compensated and not reinstated, to order payment to the Applicant of a compensation equivalent to five years net base salary at P4 grade for assignment to Gaza;

H. To order payment of US \$250,000 as compensation for the material and professional injury sustained and its moral and financial consequences on the Applicant's professional career and expectations;

I. To order reimbursement of all legal costs incurred in relation to the present complaint."

Whereas, the Respondent filed his answer on 27 October 1995;

Whereas, the Applicant filed written observations on 25 January 1996, on which the Respondent submitted comments on 15 March 1996;

Whereas, on 23 February 1996, the Applicant submitted a request for an additional document and on 22 April 1996, the Respondent submitted his views thereon;

On 1 November 1991, he assumed his new functions. On 14 December 1991, the Applicant requested the Secretary-General to review the decision to assign him to hardship posts.

On 4 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) alleging discrimination in his various assignments to hardship duty stations. From 6 April 1992, the Applicant was placed on medical leave, and, on 13 April 1992, he was evacuated from Garissa to Nairobi, where he remained on medical leave until 2 August 1992.

In a cable dated 16 July 1992, an official of the Personnel Section at Headquarters informed the UNHCR Office in Kenya that "according to medical determination from Joint Medical Service following earlier medical report from Nairobi [the Applicant] was to be considered for other duties and away from the field, preferably in a capital with appropriate medical facilities. [The Applicant] therefore being considered for reassignment. Would in this connection also urge [the Applicant] to apply for suitable vacancies".

In a medical report dated 28 July 1992, a doctor in Kenya detailed problems that the Applicant faced with his vision, concluding, "[The Applicant] needs posting where immediate ophthalmic attention is available as pan-uveitis is a sight threatening disease". On 2 August 1992, the Applicant was authorized to travel on home leave to The Gambia.

On 18 November 1992, a UN Dispensary Physician in The Gambia transmitted to the Joint Medical Service at Headquarters a medical report from an ophthalmologist in The Gambia who had examined and treated the Applicant for eye problems. The report described the Applicant's condition as "possibly recurrent and sight threatening" and stated "it is important that [the Applicant] always has access to ophthalmic expertise and drugs." On 29 November 1992, the Regional Representative for West Africa, Dakar, forwarded to the Joint Medical Service at Headquarters a medical report on the

Applicant from an ophthalmologist in Dakar, also recommending treatment "in USA or Europe".

On 4 December 1992, the Applicant was informed that he had been selected for the position of Senior Repatriation Officer in Kinshasa, Zaire. In a reply dated 11 December 1992, the Applicant informed the Director, Division of Human Resources Management, that he would be unable to confirm his availability for the post "in view medical determination by Joint Medical Service [JMS] that posting should be considered for a capital city with appropriate medical facilities". Also "Kinshasa Zaire is classified as a 'D' duty station therefore reasonable to assume that medical facilities inappropriate and not in strict accordance with JMS determination".

In a memorandum dated 31 December 1992, to UNHCR Headquarters, the Resident Representative, The Gambia, transmitted a recommendation for medical evacuation of the Applicant and requested authorization for the necessary travel arrangements. On 7 January 1993, medical evacuation of the Applicant to Dakar, Senegal, was authorized.

On 13 January 1993, a Personnel Officer asked the Joint Medical Service to advise whether Kinshasa had the necessary medical facilities to enable the assignment of the Applicant to that duty station. In a reply dated 1 March 1993, the Director of the Medical Service stated that the Applicant could serve in Kinshasa, provided that he was able to travel once a month to Brazzaville for medical treatment.

On 5 April 1993, the Applicant was informed that he had been appointed as Deputy Regional Representative, Kinshasa, with effect from 1 May 1993. On 11 April 1993, the Applicant informed UNHCR Headquarters "regret my inability to assume appointment as Deputy Regional Representative, Kinshasa, Zaire, in view of same health circumstances".

On 28 April 1993, the Applicant was advised by the Personnel Office that the Joint Medical Service had determined "there is no reason to preclude you from taking up this assignment, adding however that, should there be no ophthalmological treatment available in Kinshasa, you should be permitted to travel to Congo, Brazzaville, each month for appropriate treatment". The Applicant was further advised "you [are] expected to travel immediately to Zaire reporting no later than 21 May 1993. Failure to do so, without prior approval from Headquarters, will be considered as abandonment of post, which will lead to separation from service".

An exchange of correspondence ensued between the Applicant and the Administration concerning his refusal to assume his new functions and his medical condition.

On 2 June 1993, the Applicant was again instructed by Headquarters to report for duty, by 16 June, and advised that "your absence from duty will be considered as abandonment of post". He was further advised, "should you fail to report to duty, despite warnings given, your intent to separate from the organization will be presumed". In a reply dated 5 June 1993, the Applicant stated:

"My failure to assume duty at Zaire can never amount to an abandonment of post as per 105.1 of the staff rules because I have very strong and cogent reasons and explanations for not doing so ... I have no intention to separate myself from the Organisation. All I want is an assignment that would not work injury to my health."

On 21 August 1993, the Applicant wrote to the Secretary-General, referring to his letter of 14 December 1991 and noting, "the proceeding of my appeal has lasted over one and a half years without conclusion ..." He requested permission to submit his appeal directly to the Administrative Tribunal.

In a cable dated 30 September 1993, the Applicant was advised that "... your continued absence from the duty station to which the High Commissioner has assigned you is considered as unauthorised and

under the provisions of Staff Rule 105.1(6)(ii) the payment of salaries and allowances will cease with immediate effect". The Applicant was further advised that if he did not assume his duties as Deputy Representative in Zaire by 6 October 1993, "you will be regarded as having abandoned your post and will be separated from service on that date with no further notice".

In a reply dated 6 October 1993, the Applicant, noting that he had never been examined by the JMS, reiterated that "I cannot assume duties in any hardship duty station contrary to the recommendation of the UN doctor here". In reply, the Personnel Department advised the Applicant that as he did "not yield any new information or provide any adequate or acceptable evidence as to why you were unable to report for duty as Deputy Representative in Zaire on 6 October 1993 ... you are being separated from the service of the Organization for abandonment of post with effect from 6 October 1993".

On 26 December 1993, the Applicant wrote to the JAB, amending his appeal to include the decision of the High Commissioner to treat his actions as abandonment of post. On 24 January 1994, the Principal Officer, Office of the Under-Secretary-General for Administration and Management informed the Applicant that "the Secretary-General would like to have the benefit of the factual findings and recommendations of the Joint Appeals Board ...".

On 25 October 1994, the Applicant again wrote to the Secretary-General, noting the continuing delay in the JAB's consideration of his appeal and requesting permission to submit the appeal directly to the Tribunal. On 15 November 1994, the Under-Secretary-General for Administration and Management granted the Applicant's request.

On 21 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

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Whereas the Applicant's principal contentions are:

1. All the Applicant's assignments were in hardship postings. The Applicant was not fairly considered for more favourable duty stations and the proper procedure for assignment and rotation of staff was not followed.

2. The Applicant did not abandon his post and termination of his appointment on that ground is wrongful. The Applicant's refusal to proceed to Kinshasa was related to his medical condition, which made it impossible for him to serve there.

3. The Joint Medical Service was wrong to make a finding contrary to that of the UN resident doctor who examined the Applicant.

Whereas the Respondent's principal contentions are:

1. Separation on the grounds of abandonment of post is caused by the actions of the staff member. The Applicant was repeatedly warned that failure to report for duty would be treated as abandonment of post and his deliberate decision to defy written instructions to report for duty constitutes abandonment of post.

2. The Applicant's appointment is subject to the Staff Regulations and Rules which bind the Applicant. The Applicant's Letter of Appointment does not exempt him from Staff Regulation 1.2 to enable him to refuse to report for assigned duties.

The Tribunal, having deliberated from 11 July to 2 August 1996, now pronounces the following judgement:

- I. The Applicant was a staff member of UNHCR from 1 April 1980 to 6 October 1993, when he was separated from service for abandonment of post. During the course of the Applicant's career, he served in several hardship duty stations. He protested, suggesting that he was being subjected to discrimination by these

consecutive hardship assignments. Finally, for medical reasons, he refused to accept an assignment, first, to the post of Senior Repatriation Officer and then, to the post of Deputy Regional Representative in Kinshasa, Zaire. This refusal led to his separation from service.

II. On 4 May 1992, prior to the assignment which led to his separation, the Applicant filed an appeal with the Joint Appeals Board (JAB), alleging discrimination in the pattern of his assignments. Following his separation, the Applicant amended his appeal to include the issue of his separation for abandonment of post. The Applicant had requested, in the light of the long delay in consideration of his JAB appeal, that the Respondent allow him to submit the appeal directly to the Tribunal. In January 1994, this request was rejected, but it was eventually granted on 15 November 1994.

III. The first issue for the Tribunal to determine is the proper scope of the Applicant's appeal. The Respondent argues that the appeal should be limited to the issue of abandonment of post. The Tribunal finds that the Respondent gave his consent, without limitation, to the Applicant to submit his appeal directly to the Tribunal. No limitation can subsequently be imposed by the Respondent.

IV. The Applicant argues that he should not have been separated for abandonment of post because he never assumed the post which he is said to have abandoned. The Tribunal accepts the Applicant's argument on this point. The Applicant explained his refusal to assume the post, based on his medical condition. The Respondent rejected this explanation. The Administration insisted that the

Applicant take up the post and warned him that he would be separated if refused. Under such circumstances, the Tribunal finds that, although the Applicant should have assumed the post and protested this decision through the established channels of administrative recourse, the Respondent acted wrongly in proceeding as he did.

V. The issue in this case is the Applicant's refusal to assume the functions of the post to which he had been assigned. The Respondent should have submitted this conduct to disciplinary proceedings. Such proceedings would have given the Applicant due process protection and an opportunity to defend his conduct by raising the medical issues in his case. By separating the Applicant for abandonment of post, the Respondent denied him this opportunity.

VI. While the Applicant does appear to have been posted to many hardship duty stations, he has not adduced evidence of discrimination. Staff Regulation 1.2 provides that "staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations". The Tribunal finds that it was within the discretion of the Respondent to assign the Applicant to Kinshasa, Zaire. The Applicant has provided evidence of his medical condition, but he has not produced evidence that his submissions to the Medical Office were reviewed in a manner which lacked impartiality or was tainted by extraneous factors. A determination was made, following review of the medical submissions of the Applicant, that he could undertake service in Zaire. It is not for the Tribunal to substitute its judgement for that of the Medical Service in this respect, in the absence of a showing of improper motive or procedural irregularity.

VII. With regard to the issue of proper notice of termination, the Tribunal finds that, although the Applicant was given ample

notice of his impending separation, having been warned in writing on four occasions that his refusal to report to duty would result in his separation, proceedings to separate the Applicant from service in these circumstances should have been conducted under Staff Regulation 10.2. In this manner, a more appropriate review could then have been conducted of the medical issues raised by the Applicant in explanation of his refusal.

VIII. For the foregoing reasons, the Tribunal concludes that the Applicant should not have been separated from service on the grounds of abandonment of post. Accordingly, the Tribunal:

A. (1) Rescinds the decision of the Respondent dated 6 October 1993;

(2) Orders that the Applicant be reinstated to a post comparable to that to which he was assigned with full payment of salary and emoluments from the date of his separation, less his earnings from other employment in the interim.

B. Should the Secretary-General, within 30 days of the notification of this judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant as one year of his net base salary payable at the rate in effect on the date of his separation from service. This sum includes any entitlement the Applicant may have had to a termination indemnity under the pertinent Staff Regulations and Rules.

C. As regards his claim for compensation for a job related illness, this should be submitted to the appropriate instance under Appendix D to the Staff Regulations and Rules.



**Administrative Tribunal**

Distr.  
LIMITED

AT/DEC/770  
2 August 1996

ORIGINAL: ENGLISH

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ADMINISTRATIVE TRIBUNAL

Judgement No. 770

Case No. 835: SIDIBEH

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding;  
Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 25 October 1993, 25 October and 19 December 1994,  
Lamin Sidibeh, a former staff member of the United Nations High  
Commissioner for Refugees (hereinafter referred to as UNHCR), filed  
an application that did not fulfil all the formal requirements of  
article 7 of the Rules of the Tribunal;

Whereas, on 21 January 1995, the Applicant, after making the  
necessary corrections, again filed an application requesting the  
Tribunal:

"...

- (1) To reinstate me into UNHCR, due regard being given to my seniority, promotion and my right for rotation to a Category A or B duty station.
- (2) To order the payment of compensation for my job related illness of arthritis which resulted in uveitis causing a permanent reduction in the vision of my left eye.
- (3) ... that all entitlements due to me by way of financial benefits and allowances, from the date of the wrongful termination of my appointment to date, be paid to me.

- (4) To administer some form of punishment on those staff members of UNHCR, Lagos office who made serious, malicious allegations against me, which were all found to be false ..."

Whereas, the Respondent filed his answer on 18 May 1995;

Whereas, the Applicant filed written observations on 21 June 1995;

Whereas, on 3 July 1996, the Application filed an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR, following a two-year term of service from 1978 to 1980 in the Regional Office of the United Nations Children's Fund in Nairobi, Kenya, on 1 April 1980, on a one-year intermediate term appointment at the L-2, step II level, as Associate Programme Officer. After serving successively in Somalia and Sudan, on 1 October 1987, he was appointed Head of the Sub-Office, Dire Dawa, Ethiopia. On 1 July 1988, the Applicant was granted an indefinite appointment at the P-4 level. From 1 November 1991, he was assigned to Nigeria as Chief of Mission in Lagos. On 12 August 1991, he was informed that he had been appointed as Head of Field Office, Garissa, Kenya. With effect from 6 October 1993, the Applicant was separated from service for abandonment of post.

In a memorandum dated 15 August 1991, to the High Commissioner for Refugees, the Applicant noted that his last appointment was to another hardship posting after twelve years of consecutive hardship postings. He suggested that perhaps he was being subjected to disciplinary action and stated: "I absolutely and honestly need a break from another hardship posting at this point in time".

Whereas, on 11 July 1996, the Tribunal ordered the production of the document requested by the Applicant, and put questions to the Respondent, to which he provided answers on 15 July 1996;

Whereas, on 19 July 1996, the Tribunal informed the Respondent that it could not accept the document with the condition attached, namely that it not be made available to the Applicant;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 June 1988, as a Public Information Officer in Jerusalem, on a one year fixed-term appointment at the P-3, step III level. His appointment was extended for one year, and subsequently for a further three year period. With effect from 1 July 1990, the Applicant was promoted to the P-4 level, as Senior External Relations Officer and transferred to UNRWA Headquarters. On 26 May 1991, the Applicant was temporarily assigned to UNRWA's Field Office in Gaza as a Refugee Affairs Officer. On 2 July 1991, he was assigned, in an acting capacity, to the post of Public Information Officer. With effect from 1 October 1991, the Applicant was formally transferred to this post. The Applicant separated from service on 29 May 1993, upon the expiration of his appointment.

In a letter dated 3 May 1991, the Director of Personnel confirmed "the Agency's decision to send you on temporary assignment to Gaza as a Refugee Affairs Officer". He informed the Applicant that "the temporary assignment shall be for an initial period of 4 months, but with the possibility of an extension". In a letter dated 12 June 1991, the Chief, Personnel Services Division, advised the Applicant that his assignment would be "for an initial period of one year".

On 1 December 1992, the Personnel Resources Committee met to consider the upcoming expiration of three staff appointments,

including the Applicant's, and the recommendation in all cases by the staff members' supervisors that the appointments be extended. According to the record of the meeting, "The Committee decided to defer a recommendation on [the Applicant] until a date some three months before the expiry of his present appointment". At a subsequent meeting, held on 5 February 1993, the Personnel Resources Committee noted that the Director of UNRWA Operations, Gaza, "has recommended [the Applicant's] extension but not in the occupied territory, where 'there have been some complaints about his public relations image.' (The Director adds: 'He is however doing a good job.')

If he is to be extended, but not in the occupied territory, the only feasible option was considered by the Committee to be a rotation ...". The Committee asked the Director of Personnel "to explore such a rotation" and to report back.

A handwritten note on the Minutes of the Committee meeting states: "I have come to the conclusion that [the Applicant's] contract should not be renewed. Please advise him ...". On 12 February 1993, the Director of Personnel advised the Applicant that on account of "the stresses associated with living and working in Gaza, it is not considered desirable to extend service in that duty station for a further period". He noted the upcoming expiration of the Applicant's appointment and informed him that the Commissioner-General had "explored the possibility of an alternative posting for you" but that such possibilities "are so extremely limited that he has reluctantly come to the conclusion that an extension of your appointment beyond 29 May 1993 is not feasible".

In a letter dated 10 March 1993, the Applicant requested the Commissioner-General to review the decision not to extend his appointment, pointing out that he would "have completed five years' service with the Agency by 29 May 1993, without any adverse periodic reports. In these circumstances, I consider that I am entitled to expect a renewal of my contract". Referring to the

unavailability of an alternative posting, he confirmed that "I do not seek an alternative posting, and am happy to remain in Gaza if my contract is renewed".

In a reply dated 1 April 1993, the Commissioner-General informed the Applicant that "an exception to the duration of service [in Gaza] would not be in the best interest of the Agency, and that, unfortunately, a rotation of other personnel would equally not be in the interest of our operations. Noting that "the Agency has not acted in a way that could justify, on your part, a legitimate expectation that your contract would be renewed", the Commissioner-General confirmed his decision.

On 12 April 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 25 February 1994. Its conclusions read, inter alia, as follows:

"29. The Appellant claimed that the administrative decision to allow his fixed-term appointment to expire was an arbitrary one and was not based on a sound professional assessment of his work. The Board concurs with the Appellant that his work was satisfactory but nevertheless recognizes the fact that staff members of the Agency are subject to the sole authority of the Commissioner-General and consequently must come to the conclusion that the Respondent had every right to decide to let the Appellant's fixed-term contract expire on 29 May 1993.

30. The Board decides, therefore, to advise the Commissioner-General that, within the terms of the Letter of Appointment, the Agency Staff Regulations and Rules, it finds no basis for upholding the Appellant's appeal and accordingly recommends that the administrative decision to allow the Appellant's fixed-term appointment to expire on 29 May 1993 be upheld."

On 11 March 1994, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"... You will note that the Board has concluded that the Administration's decision to allow your fixed-term

appointment with the Agency to expire without renewal was lawful and proper and in compliance with your letter of appointment and the relevant regulations, rules and personnel directives. The Board, therefore, recommended that the Administration's decision be upheld and that your appeal be dismissed. I accept these conclusions and recommendations; your appeal is, therefore, dismissed.

..."

On 12 January 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had no reason to believe his appointment would not be extended. He had a legitimate expectancy of further employment.

2. The Respondent failed to communicate the real reasons for the non-extension of the Applicant's appointment. The decision was unfounded and arbitrary and deprived the Applicant of due process.

Whereas the Respondent's principal contentions are:

1. The decision not to extend the Applicant's fixed-term contract was within the Respondent's discretion.

2. The Respondent's decision was a legitimate exercise of his discretion, which was made to ensure the proper functioning of the Agency.

The Tribunal, having deliberated from 10 July to 2 August 1996, now pronounces the following judgement:

- I. At its meeting of 5 February 1993, the Personnel Resources Committee considered the recommendation of the Director of UNRWA Operations, Gaza, that the Applicant's appointment be extended,

but not in the occupied territory. The Director stated that there had been some complaints about the Applicant's public relations image but added "He is, however, doing a good job". The Committee's view was that, if the appointment was to be extended, but not in the occupied territory, the only feasible option was rotation.

The Committee requested an exploration of the rotation option suggested, but the Commissioner-General subsequently stated that he had come to the conclusion that the Applicant's contract should not be extended.

In a letter of 12 February 1993, the Applicant was informed by the Director of Personnel that, in accordance with the Agency's policy, which took into account the stresses associated with living and working in Gaza, it was not considered desirable to extend service in that duty station. He was told that the Commissioner-General had explored the possibility of an alternative posting, but the possibilities were so extremely limited that he had reluctantly come to the conclusion that an extension was not feasible.

II. The Applicant requested the Commissioner-General to review this decision, noting that he would be happy to remain in Gaza. In a reply of 1 April 1993, the Commissioner-General informed the Applicant that international staff members were expected to serve in Gaza normally for two years, a policy established because of the difficult situation in the Gaza strip, which took into account the interests of both the staff member and the Agency.

III. The Applicant makes a number of arguments in support of his case. In the main, he says that he would have completed a total of five years with the Agency by 29 May 1993; that his periodic reports had been good, that his two supervisors had told him that they had advised positively on his extension; that it was a

general policy of the United Nations system that in his situation an extension of five years could be expected; that, in early 1993, both the Director of Personnel and the Deputy Director of Personnel foresaw no problem with his extension; that the policy, in regard to staff members normally being expected to serve no more than two years in Gaza, was ignored and that officials, whom he lists, spent longer periods in Gaza; he also claims that rotation would have been feasible and that the question was not explored, that neither the Chief, Public Information Office, nor the Public Information Officer/West Bank had been consulted.

IV. The Respondent contends that the terms of the written rules and written policy did not give the Applicant any expectation of renewal, nor, indeed, is there evidence to show that the Respondent did anything to create such an expectation. The Respondent says that in the absence of any legitimate expectancy of renewal, the reasons for the Respondent's choosing not to offer the Applicant an extension of his contract are irrelevant, provided that the decision is exercised in a proper manner.

The Respondent refers to policy on International Staff Rotation to move such staff within two years. If the exigencies of the operations require that a staff member serve for longer at one duty station than is generally desirable, the current performance of the staff member concerned is a relevant factor.

The Respondent argues that the words of the Commissioner-General, written on the Committee's minutes "I have come to the conclusion ...", imply that the Commissioner-General considered the matter of rotation, that the brief time which elapsed does not mean that there was not due consideration, that speed was essential so that the Applicant could be informed as soon as possible of his non-extension, in order to enable him to seek alternative employment.

V. The Applicant did not have a right to renewal. The factors cited by the Applicant, namely encouragement by various superiors, his reasonably substantial period of service, his positive performance reports, the suggestion that the policy of staff members normally serving two years in Gaza was sometimes ignored, do not establish such a right.

The fact that the period which elapsed before the Commissioner-General gave his conclusion on rotation and non-renewal was short, does not, of itself, mean that due consideration was not given. The Commissioner-General furnishes what seems to be a reasonable explanation, namely to give the Applicant an opportunity to seek other employment.

VI. However, the Tribunal notes that there was a complaint, made by a journalist, regarding the Applicant, which may have played some part in the Commissioner-General's decision. The Applicant was initially informed of the journalist's complaint and asked to respond. It was, perhaps, the same matter which resurfaced in the Director's recommendation, which noted that there had been some complaints about the Applicant's public relations image. This recommendation was made on a routing slip, which, in effect, took on the characteristics of a performance report. The Applicant should have been allowed to respond to it in that context, i.e. the process in which his extension was being considered. Such an omission constitutes a procedural irregularity in that it represents a failure to afford the Applicant his right in this regard. For this, he is entitled to compensation.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant three months of his net base salary at the rate in effect on the date of his separation from service.

All other pleas are rejected, including the Applicant's request for costs.

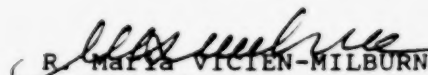
(Signatures)

Hubert THIERRY  
Vice-President, presiding

Mikuin Leliel BALANDA  
Member

Francis SPAIN  
Member

Geneva, 2 August 1996

  
R. MARIA VICIEN-MILBURN  
Executive Secretary

D. Rejects all other pleas.

(Signatures)

Hubert THIERRY  
Vice-President, presiding

Mikuin Leliel BALANDA  
Member

Mayer GABAY  
Member

Geneva, 2 August 1996

  
R. Maria VICIEN-MILBURN  
Executive Secretary



## Administrative Tribunal

Distr.  
LIMITEDAT/DEC/771  
2 August 1996

ORIGINAL: ENGLISH

## ADMINISTRATIVE TRIBUNAL

Judgement No. 771

Case No. 839: D'CRUZ

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President,  
presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, at the request of Cleophus D'Cruz, a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 31 October 1994, 31 January and 30 April 1995;

Whereas, on 14 February 1995, the Applicant filed an application requesting the Tribunal, inter alia, to take certain preliminary measures, to call certain witnesses and to order the production of certain documents, and:

"[To be granted] an appropriate status and level of earnings, at the P4/P5/D1 [level], and to be exceptionally groomed for functions relative to the above; installation to be effective retroactive [to] 1990, given the reasonable span from June 1982 to the present during which time my then newly acquired skills could have been employed, observed, and assessed, in a practical environment conducive to demonstrable skills. I also request a sabbatical for a Post Graduate Doctoral Programme and Research Project, **vide ST/IC/1993/69 dated 15 December 1993.**

Additionally, I would like 6 months - 1 year full time devotion to a refresher in and preparation for, a French Language Proficiency, **vide ST/AI/281/REV.1, para. 14, dated 9 April 1990**, and the opportunity to achieve a fair level of

Computer literacy, and whatever is necessary to return me to a competitive status by Organizational requirements, **vide again ST/AI/281/Rev.1, para. 3.**

...

[and]

1. If proved that Forgery, Fraud, and Complicity, prevailed, then I recommend full retribution be applied to the individuals concerned, and additional serious consideration be given to culpability with respect to Tort and Libel.

...

Additional compensation specific to aggravated assault on career opportunities, character assassination, and pain and suffering caused by reduced earning potential, and ultimately the public humiliation associated with my suspension and the overwhelming UN Security presence ...

..."

and

"[The payment of an unspecified amount of compensation for various losses and damages suffered and reimbursement for certain expenses related to his appeal.]"

Whereas the Respondent filed his answer on 21 March 1995;

Whereas, on 17 April 1995, the Applicant submitted a request for the production of documents, and on 8 May 1995, the Respondent submitted comments thereon;

Whereas, on 2 June 1995, the Applicant again submitted his request for the production of documents and, on 13 June 1995, the Respondent submitted comments thereon;

Whereas the Applicant filed written observations on 30 October 1995;

Whereas, on 7 and 24 June 1996, the Applicant submitted additional comments and documents;

Whereas, on 4 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 4 July 1996, the Tribunal requested the production of documents from the Respondent, which he provided on 11 July 1996, with a request that they "be reviewed in camera" upon the condition that they not be made available to the Applicant;

Whereas, on 16 July 1996, the Tribunal refused to accept the Respondent's conditions and transmitted the documents to the Applicant;

Whereas, on 23 July 1996, the Tribunal rejected a request by the Applicant that the Tribunal reconsider its ruling on oral proceedings;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 14 September 1970, as a Clerk in the Bureau of Administrative Management and Budget at the G-2 level, on a three month fixed-term appointment. On 14 December 1970, he was granted a probationary appointment and on 1 September 1972, a permanent appointment, his entry grade having been reclassified to the G-3 level. On 1 July 1976, his functional title became Accounts Clerk, and he was assigned to the Accounts Section, Division of Finance. On 1 January 1978, he was promoted to the G-4 level. With effect from 1 January 1985, the Applicant's post was reclassified, and he was promoted to the G-6 level. In October 1985, he was assigned to the Agency Accounts Unit. From August 1987 to September 1989, the Applicant was assigned to the Travel Accounts Task Force. Thereafter, he returned to the Agency Accounts Task force. On 15 September 1993, the Applicant was suspended with pay for three months. The suspension was extended through 30 April 1994. On 26 September 1994, the Applicant was temporarily assigned to the Division of Personnel (DOP) as an Account Assistant.

In a memorandum dated 4 January 1991, the Chief of the Agency Accounts Unit, advised the Chairman of the Management Review Panel of the Division of Finance (DOF) that the Applicant refused to participate in the Performance Appraisal Review (PAR) exercise. On

31 January 1991, the Management Review Panel, noting that the Applicant's supervisor had given him a 4 rating in his PAR, concluded that "in view of his poor performance, bad attitude to work and refusal to participate in the PAR process that a 5 rating is justified". He recommended that "consideration be given to DOP initiating discussions as to separation from service".

On 9 April 1991, the Applicant expressed to the Assistant Administrator and Director, Bureau for Finance and Administration (BFA), DOP, his concerns regarding the PAR process, adding: "The rating of 5 is in no way the least bit a reflection on me as it is on those who have conducted this poor apology for a managerial/administrative process".

On 24 May 1991, the Assistant Administrator advised the Director, DOP, "In view of the staff member's obdurate position and intemperate language, I believe that it is imperative to act swiftly to resolve this issue."

On 7 June 1991, the Director, DOP, recommended to the UNDP Appointment and Promotion Panel that the Applicant's appointment be terminated for unsatisfactory service, noting that "beginning in April 1989, there has been a steady deterioration in his performance and attitude toward his work, his supervisors and the BFA management".

The Applicant's case was referred to a Joint Review Body (JRB). On 16 April 1992, the Director, DOP, informed the Applicant that "upon the advice of the Joint Review Body, the Administrator decided not to terminate your permanent appointment with UNDP". He had, however, instructed the Director to formally reprimand the Applicant for refusing to participate in the 1990 PAR process and for "use of insulting language in addressing management". The Director further stated that, based on the 1991 PAR process, in which the Applicant had refused to participate, his case "is being resubmitted to the Joint Review Body for the purpose of considering the termination of your permanent appointment for unsatisfactory service."

In a reply dated 30 April 1992, the Applicant requested a copy of the JRB report from the Appointment and Promotions Board. The report was not made available.

On 9 July 1992, the Applicant's case was again submitted to the Appointment and Promotion Panel with a request to convene a joint review body. On 12 April 1993, the UNDP Administrator informed the Applicant that, on the advice of the JRB, he had decided against termination of his services. He noted the Applicant's "utter lack of cooperation", citing his refusal to participate in the PAR process, his use of insulting language in communications with management, and his refusal to meet with the Director, DOP. He informed the Applicant that he had decided to reassign him outside the DOF.

On 12 April 1993, the Applicant wrote to the Secretary-General requesting permission to present his case directly to the Administrative Tribunal. On 4 May 1993, this request was denied.

On 27 July 1993, the Chief of Staffing, DOP, informed the Applicant that his post was to be abolished and that he was to meet with a representative of DOP, no later than 28 July 1993, to indicate other posts for which he wished to be considered. In his reply dated 28 July 1993, the Applicant stated "I can only conclude that this is yet another feature in the continuing saga of harassment."

On 23 August 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB), alleging unfair treatment by UNDP and contesting his reassignment and the abolition of his post.

On 15 September 1993, the Officer-in-Charge, DOP, informed the Applicant that he was charged with misconduct under Staff Rule 110.1, for insubordination and use of insulting language, and that he was suspended from duty with pay, pending the investigation of the charges against him. He was instructed to surrender his access card and grounds pass immediately and not to enter UNDP premises without written permission. On 16 September 1993, the Director, DOP, informed the Applicant that his refusal to leave

UNDP premises following his suspension, and his refusal to surrender his access card and grounds pass, constituted serious misconduct. Should the Applicant again enter the premises of UNDP without written permission, he would be summarily dismissed.

On 17 September 1993, the Applicant appealed to the JAB for suspension of action of the above-mentioned decisions. One hundred and fifty nine colleagues of the Applicant signed an open letter, dated 30 September 1993, stating "to our knowledge [the Applicant] has never been a threat to the organization, its properties, his superiors or any of his colleagues".

On 8 October 1993, the JAB adopted its report on the request for suspension of action, concluding "The Panel does not recommend [the Applicant's] suspension with pay. It does recommend, however, that every effort be made to expedite both the appeal and the investigation". On 21 October 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's report and informed him that the Secretary-General "has decided not to grant your request for suspension of the decision to suspend you from duty with UNDP with pay pending an investigation of charges made against you". She further stated that the Secretary-General accepted "the Board's recommendation that every effort be made to expedite both the appeal and the investigation ..."

On 25 January 1994, the JAB adopted its report. It recommended that the Applicant "be maintained on a core post, until the completion of the disciplinary proceedings referred to in the letter of 15 September 1993". On 25 February 1994, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report and has noted its finding that your appeal was receivable. He has also noted the Board's concerns regarding the handling of your case and its discussion of the totality of your service with UNDP. He has also noted the Board's recommendation that you be maintained

on a core post until the completion of the disciplinary proceedings in your case.

The Secretary-General is aware that your former core post was abolished at the end of 1993. He has decided not to take any action regarding placing you against another core post at this point. The proceedings in your disciplinary case are in progress and, until their completion, UNDP will maintain your full pay status."

On 4 March 1994, the Disciplinary Committee transmitted its report to the Administrator. Its findings and conclusion read, inter alia, as follows:

"12. The Committee decided that the present case is not a clear-cut case. Therefore, it recommends to the Administrator that the s/m [staff member] be given a last fair chance. The Committee would furthermore suggest that UNDP management convey to the s/m that this recommendation has been made in the hope that he fully recognizes his obligation - under Staff Regulation 1.2 - to act in conformity with the requirements of the Organization.

13. Should the s/m reject this offer of a last fair chance and continue to be defiant and inflexible, the Committee would recommend his separation (with notice) from UNDP service." (emphasis in original).

On 28 April 1994, the Director, DOP, transmitted to the Applicant a copy of the Joint Disciplinary Committee report and informed him that the Administrator had decided to accept the Committee's recommendation that he be given "a last fair chance", but noting "I must remind you that should you maintain a defiant attitude he will have no option but to proceed with your separation from UNDP". He informed the Applicant that his suspension would end on 30 April 1994 and instructed him to report to a Staffing Specialist, on 2 May 1994 "in order to review the plans for your reassignment." On 26 September 1994, the Applicant was temporarily assigned to DOP as an Account Assistant.

On 14 February 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The submission of the Applicant's case to the JRB violated the Applicant's due process rights. Submission of the case twice constituted "double jeopardy".
2. The Applicant received improper notice of the abolition of his post.
3. Suspension of the Applicant was carried out in violation of the staff rules.
4. The Applicant has been subjected to a hostile environment and to discriminatory treatment.

Whereas the Respondent's principal contentions are:

1. Assignment of staff is at the discretion of the Secretary-General. The Applicant has not discharged the burden of proving that his re-assignment was improperly motivated.
2. The Secretary-General's decision to end the Applicant's suspension and to give him another chance by assigning him new tasks was a valid exercise of discretion, in favour of the Applicant.

The Tribunal, having deliberated from 4 July to 2 August 1996, now pronounces the following judgement:

I. The Applicant entered the service of UNDP in September 1970. In 1972, he was granted a permanent appointment. Having served in the Agency Accounts Unit, the Applicant was assigned for several years to the Travel Accounts Task Force. In 1989, he returned to the Agency Accounts Unit.

II. In 1990 and in 1991, the Applicant refused to participate in the Performance Appraisal Review (PAR) process. He was highly critical of the PAR process, as well as of UNDP management. Twice, the Applicant's case was submitted to a Joint Review Body (JRB) to

consider the termination of his appointment, and twice, in 1992 and in 1993, the JRB recommended against termination. On 27 July 1993, the Applicant was informed that his post would be abolished, and he was asked to indicate his preference for an alternative assignment. The Applicant took this as "yet another feature in the continuing saga of harassment". On 23 August 1993, he lodged an appeal with the Joint Appeals Board (JAB), alleging unfair treatment and contesting his reassignment and the abolition of his post.

III. On 15 September 1993, the Applicant was suspended from duty, with pay, and charged with insubordinate behaviour and use of inappropriate language. A disciplinary proceeding was then instituted before the Joint Disciplinary Committee (JDC). The JAB, in considering the Applicant's appeal, took note of the disciplinary proceedings, which had commenced and recommended, in January 1994, that the Applicant be maintained on a core post until the completion of these proceedings. The Secretary-General did not accept the JAB's recommendation. The JDC in its report of March 1994, recommended that the Applicant be given "a last fair chance". The Applicant's suspension with pay was lifted and he was asked to report for duty on 2 May 1994.

IV. The Applicant appeals to the Tribunal from the Secretary-General's decisions on both the JAB and the JDC's recommendations. His pleas appear to consist mainly of a request to remain in his former post, arguing that, if he were placed in another post, this would constitute a sanction. He further argues that the manner in which he was treated is evidence of prejudice. The Applicant also argues that the submission of his case, twice, to the JRB constituted "double jeopardy", and that he should have been provided with a copy of the reports of the JRB. He claims he was given improper notice of the abolition of his post and that he was subjected to a hostile work environment.

V. The JDC was unable to attribute sole responsibility to the Applicant for problems related to him. The Tribunal notes that the Applicant used unnecessarily strong language, and that he refused to cooperate in the PAR process. The Tribunal is, however, unable to determine, from the record, the cause in the Applicant's change of behaviour after eighteen years of excellent service with the Organization.

VI. It appears that the Applicant holds firmly to the objective of reinstatement in his former post. However, the Tribunal notes that this post has been abolished. The Applicant may believe that the abolition of the post was motivated by prejudice against him, but he has not adduced sufficient evidence to prove it. Cf. Judgements No. 312, Roberts (1983) and No. 428, Kumar (1988). The Administrator did offer him the opportunity to seek an alternative assignment, both at the time the post was abolished and, again, following the JDC's recommendation to give the Applicant a last fair chance. The JAB reviewed the procedure followed by UNDP in the abolition of posts, including the Applicant's post, and it found that the staff rules had been observed. The Tribunal concurs in the JAB's conclusion.

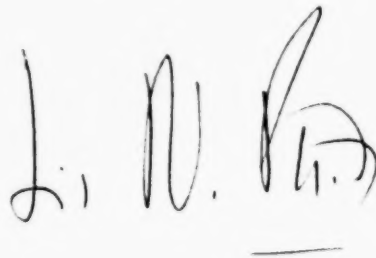
VII. In this case, it appears to the Tribunal that, despite the difficulties of the past several years, the Respondent is willing to reintegrate the Applicant into service and has made some effort to do so. In the Tribunal's view, the Applicant should make a good faith effort to work with the Respondent in this endeavour. The Applicant has no right to assignment to a particular post, and the abolition of his post was carried out in accordance with the relevant procedures. Although the Tribunal notes that the Applicant's recent work environment has been characterized by conflict and hostility, it does not find conclusive evidence that the Respondent was entirely responsible for this environment, as the Applicant was unwilling to cooperate in the management process.

The JRB, in its report of 28 October 1992, aptly summarized this case as "one of misunderstanding between various parties where it becomes more and more difficult to break a vicious circle and to discern between the causes and the effects". The Tribunal reiterates that the Applicant should cooperate with the Respondent, in the interest of the proper functioning of the Organization.

VIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Luis de POSADAS MONTERO  
Vice-President, presiding

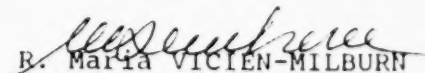


Francis SPAIN  
Member



Mayer GABAY  
Member

Geneva, 2 August 1996



R. Maria VICIEN-MILBURN  
Executive Secretary



Administrative Tribunal

Distr.  
LIMITED

AT/DEC/772  
2 August 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 772

Case No. 840: ZEID

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Luis de Posadas Montero, Vice-President,  
presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;  
Whereas, on 19 March 1995, Galal M. A. Zeid, a staff member  
of the United Nations, filed an application requesting the Tribunal,  
inter alia:

"[To] find that:

a) The Applicant is entitled to:

- (i) have the recommendations of the Rebuttal Panel  
(...) implemented in toto, by upgrading from 'B' to  
'A' ... in the rebutted PER (...) for items: 14.ii  
(Accuracy and Style for both Arabic and English),  
1. (Competence) and 2. (Quality of work);
- (ii) the rectification, in all cases, of the erroneous  
arithmetic in the said PER (...), by correcting the  
overall rating from 'B' to 'A';
- (iii) adequate material compensation to be fixed at a two  
year P-4 salary for the actual and consequential  
moral and material damage inflicted upon him and  
for the repeated acts of prejudice to which he has  
been subjected in this case;

..."

Whereas, the Respondent filed his answer on 29 March 1995;  
Whereas, the Applicant filed written observations on 27 April

Whereas, the Applicant submitted an additional document on 2 May 1996;

Whereas, the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 July 1983, as an Interpreter Trainee at the P-1 level, on a two year fixed-term appointment. On 17 July 1985, he was granted a probationary appointment as an Associate Interpreter and promoted to the P-2 level. On 1 July 1986, his appointment was converted to permanent and he was promoted to the P-3 level, as an Interpreter. On 12 August 1990, the Applicant was transferred to the UN Office in Vienna (UNOV). On 1 June 1992, he was promoted to the P-4 level. He was transferred back to Headquarters on 13 September 1992 and assigned as an Arabic Interpreter in the Office of Conference Services, Interpretation and Meetings Division, Interpretation Services, Arabic.

On 5 November 1992, the Applicant instituted rebuttal proceedings relating to his performance evaluation report (PER), covering the period from 1 September 1991 to 11 September 1992. The Applicant contested the downgrading from his previous PER of three "A" (excellent) ratings to "B" (very good) ratings, contending that his reporting officer, who lacked knowledge of the Arabic language, had relied on "extraneous" opinions. This, he claimed, "constitutes a totally unfair process of highly doubtful legality, as I was never accorded the opportunity to know the sources of this extraneous opinion." He also protested the elimination of French as one of his working languages, and the overall rating of "B", although he had five "A" ratings and only four "B" ratings.

On 12 April 1993, the Rebuttal Panel submitted its report to the Director-General of UNOV. The Panel noted that, in an interview, the Applicant's First Reporting Officer could not recall the name of the third party on whose assessment he had relied. The Panel stated "that where a third-party/outside opinion was sought it

should be documented, particularly for referral purposes, as in this case". The Panel concluded that there was no basis for the lowering of the ratings. It recommended that the three "B" ratings be changed to "A", and that French be included in the PER as a passive language, with a rating of "C" (good).

On 13 September 1993, the Applicant was informed of the Director-General's decision to maintain the three "B" ratings, as well as the overall rating of "B", but to accept the Panel's recommendation regarding the inclusion of French. In his appraisal of the Rebuttal Panel's report, the Director-General noted that the Rebuttal Panel had only addressed the issue of the appropriateness of soliciting an outside opinion. He stated, "The situation obliged the first reporting officer to seek advice from outside parties. No secret was made of the procedure followed; it was clearly indicated on the PER. I do, however, accept the panel's view that in such cases the consultation with outside parties should be carefully documented for future reference.".

On 10 November 1993, the Applicant requested the Secretary-General to review this decision. On 10 January 1994, he lodged an appeal with the Joint Appeals Board (JAB). On 6 December 1994, the JAB adopted its report. Its considerations, recommendation, and general recommendation read as follows:

"Considerations

11. The Panel noted that it was not competent to judge the accuracy of the ratings the Appellant received by his supervisors, as reflected in his PER which he is challenging; nor could it deal with the evaluation thereof by the Rebuttal Panel. The Panel's role in this matter was limited essentially to determining whether improper motives, prejudice or what the Appellant terms 'arbitrariness' had entered into the ratings of the Appellant. As regards this aspect of the case, the Panel recalled that the United Nations Administrative Tribunal had held repeatedly that the burden of proving the existence of alleged improprieties is upon the Appellant. In the present case, that burden had not been discharged, in the opinion of the Panel.

Recommendation

12. The Panel therefore, unanimously recommends that the claim be rejected, in the absence of any evidence of violations of the PER procedure or of the Rebuttal procedures. The lack of knowledge of Arabic by the First Reporting Officer is not a violation of ST/AI/240/Rev.2.

General Recommendation

13. The Panel wishes to draw attention to the fact that although it did not consider itself competent to deal with the accuracy of the ratings challenged by the Appellant, the PER as well as the Report of the Rebuttal Panel, were too meager and without sufficient detailed justifications for the ratings, to allow any meaningful examination thereof. The Panel is well aware of the fact that present procedures do not provide for it (see ST/AI/240/Rev.2), but it would like to recommend that consideration be given to making changes requiring that ratings should be properly documented by the parties involved and contain the substantive reasons on which they are based. This would apply to the ratings given by the First and Second Reporting Officers, the report of the Rebuttal Panel and to the ultimate decision by the Assistant Secretary-General for Human Resources Management."

On 19 December 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Board's recommendation that, in the absence of any evidence of violations of the performance evaluation report procedure or of the Rebuttal procedures, the claim be rejected. The Secretary-General has decided, accordingly, to maintain the contested decision and to take no further action on your case."

On 19 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas, the Applicant's principal contentions are:

1. The assessment of the Applicant's linguistic skills in Arabic by the First Reporting Officer was improper, as the latter

lacked a knowledge of Arabic and relied on opinions of others whose identities were not made known to the Applicant and whom he himself is unable to identify.

2. The appraisal by the Director-General of UNOV of the Rebuttal Panel's report was arbitrary. The Rebuttal Panel included two competent professionals and its recommendation was overridden without justification and on false grounds.

Whereas, the Respondent's principal contentions are:

1. The Respondent is under no legal obligation to accept the Rebuttal Panel's recommendations. The evaluation of a staff member's performance is within the Respondent's discretionary authority.

2. The Applicant has not met the burden of proof showing that the Respondent's discretionary decision was arbitrary or vitiated by prejudice or other extraneous factors.

The Tribunal, having deliberated from 3 July to 2 August 1996, now pronounces the following judgement:

I. The issue in this case is whether the Respondent's decision not to accept the Rebuttal Panel's recommendations to upgrade the performance ratings of the Applicant was improper, or improperly taken. The JAB upheld the Respondent's decision and noted that it was not competent to judge either the performance ratings of the Applicant, or their review by the Rebuttal Panel. Similarly, the Tribunal cannot substitute its judgement for that of the Respondent in evaluating his staff. In reviewing the Respondent's decisions thereon, the Tribunal's role is to examine whether these decisions are arbitrary, tainted by procedural irregularity, or vitiated by prejudice or other extraneous factors. This was clearly established in the Judgement No. 448, Large (1984).

II. The JAB noted that "the PER as well as the Report of the Rebuttal Panel, were too meager and without sufficient detailed justifications of the ratings, to allow any meaningful examination thereof". On this issue, the JAB made a general recommendation that "ratings should be properly documented by the parties involved and contain the substantive reasons on which they are based".

III. The Tribunal agrees with the JAB that performance ratings should be properly documented and explained. This is a fundamental requirement of due process in performance evaluation. The Applicant claims that his First Reporting Officer, not an Arabic speaker, did not consult with anyone regarding the Applicant's language skills and, hence, his evaluation was arbitrary. The Respondent, while admitting that the First Reporting Officer was not familiar with the Arabic Language, contends that the First Reporting Officer did consult with two Arabic speakers regarding the Applicant's language skills but cannot identify who they were.

IV. Even accepting the Respondent's assertion that Arabic speakers were consulted, the Respondent's failure to identify the persons consulted cannot be justified. It is in accordance with due process that the Applicant should know by whom he is being evaluated for his language abilities in a performance review.

V. The omission of French in the Applicant's PER was an error that the Respondent corrected. The Applicant has not sustained the burden of proving that the omission of French was due to "flagrant prejudice" on the part of the First Reporting Officer.

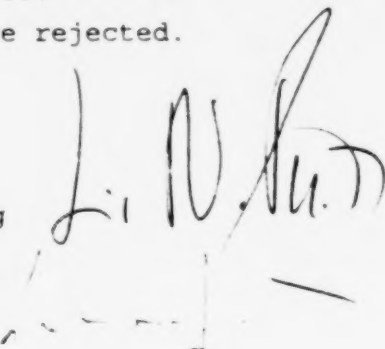
VI. The Tribunal does not find that the Respondent's decision was vitiated by prejudice or arbitrariness. However, the performance review process was tainted by the failure to identify those persons consulted, whose comments on the Applicant's performance were central to his review. In this respect, the Applicant has been denied due process.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant \$5,000.

All other pleas are rejected.

(Signatures)

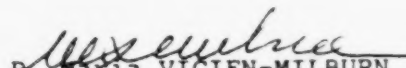
Luis de POSADAS MONTERO  
Vice-President, presiding



Mikuin Leliel BALANDA  
Member

Mayer GABAY  
Member

Geneva, 2 August 1996

  
R. Maria VICIEN-MILBURN  
Executive Secretary



Administrative Tribunal

Distr.  
LIMITED

AT/DEC/773  
2 August 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 773

Case No. 843: SOOKIA

Against: The Secretary-General  
of the International  
Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President,  
presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 28 February 1995, Bashir Ahmad Sookia, a staff  
member of the International Maritime Organization (hereinafter  
referred to as IMO), filed an application requesting the Tribunal,  
inter alia:

"[To order the production of certain documents and]

- (b) [To rescind] the wrongful decision to deduct his two  
monthly salaries; namely that of July and August 1993  
amounting to £2,275.68, consequently causing him and his  
family great financial distress.

...

- (a) [To order] his July and August salaries paid to him  
accordingly;

- (b) [That he] be reinstated to his ex post of Mailing Clerk  
(G-4) together with a compensation of £50,000 for all  
the suffering (physical, mental, emotional and  
financial) and damage done to both himself and his  
family

or

- (c) [That he] be appointed to a new post of the G-7 category

...

or

(d) [That he] be given £250,000 ..."

Whereas the Respondent filed his answer on 25 March 1996;

Whereas the Applicant filed written observations on 19 April 1996, on which the Respondent submitted comments on 19 June 1996;

Whereas, on 1 July 1996, the Respondent submitted an additional document, which the Tribunal returned to the Respondent on 16 July 1996, as it could not accept the condition not to make it available to the Applicant;

Whereas, on 16 July 1996, the Tribunal rejected the Applicant's request for the production of the same document, as it was deemed unnecessary;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO on 3 April 1978, on a fixed-term appointment at the G-2, step I level, as a Messenger in the Administrative Division, Common Services Section. His appointment was extended successively until 1 July 1979, when the Applicant was granted a probationary appointment. On 29 October 1980, his appointment was converted to a regular appointment, and he was promoted to the G-4, step I level, as a Mailing Clerk in the Central Registry of the Administrative Division, Common Services Section.

On 30 December 1988, there was an altercation at an office party in which the Chief, Office of General Services, was allegedly assaulted. A disciplinary inquiry was undertaken but it resulted in no formal action.

On 10 November 1989, the Head of Personnel Section informed the Applicant, "that the Secretary-General has decided to move you from the Central Registry, Office of General Services to the TCD [Technical Co-operation Division] Registry, pending further arrangements". The Applicant worked in the TCD Registry until

30 November 1989. From 1 December 1989 to 8 January 1990, he had no assigned functions and no office. From 8 January 1990 to 22 January 1990, he was assigned to the Maritime Training Section.

In a memorandum dated 18 January 1990, the Applicant requested the Secretary-General to review his situation, stating "it would only be fair to send me back to my old job as Mailing Clerk which I am settled in." In a reply dated 31 January 1990, the Head of Personnel Section informed the Applicant, "I am writing to confirm that the Secretary-General has decided to second you, with immediate effect, to the TCD Registry until further notice." Thereafter, from 1 May 1991 to October 1992, the Applicant served as Mailing Clerk in the TCD Registry.

In a memorandum dated 5 February 1992, to the Secretary-General, the Applicant noted that he had never been informed of the outcome of the Board of Inquiry before which he had appeared relating to the incident on 30 December 1988, but that he had been transferred from his post as a sanction. In a reply dated 18 February 1992, the Secretary-General informed the Applicant "... The decision to move you from the Central Registry, Office of General Services to the TCD Registry was ... not a disciplinary measure but, as was explained to you at the time, simply a necessary administrative arrangement since it was considered that it would not be appropriate for you and [the Chief, Office of General Services] to continue to work in the same office."

A further exchange of correspondence ensued between the Applicant and the Respondent concerning the Applicant's placement and performance. On 29 March 1993, the Applicant wrote to the Secretary-General, protesting his removal from his post without an alternative suitable post. On 18 June 1993, the Director of Administration informed the Applicant that the Secretary-General had decided to transfer him to the post of Inventory Clerk, at the G-4 level, in the Office of General Services, Administrative Division, with effect from 1 July 1993. In a reply dated 30 June 1993, the Applicant stated: "I will not take the post of Inventory Clerk ..."

In a letter dated 23 July 1993, the Director of Administration advised the Applicant as follows:

"I have been informed by the Chief of General Services that you have failed to take up the duties to which you were transferred on 1 July 1993 and, accordingly, have been absent from office without authorization since 1 July 1993. Such unauthorized absences are regulated by the provisions of Staff Rule 105.1(d), and I am writing to inform you that action is being taken to reflect the application of this rule.

Your prolonged unauthorized absence has made the work situation in the Office of General Services extremely difficult. Therefore, further unauthorized absence from duty by you would render your services to the Organization unsatisfactory and the Secretary-General will be compelled, by your action, to take disciplinary measures against you."

In a reply dated 29 July 1993, the Applicant stated, inter alia:

"... I would like to point out that Staff Rule 105.1 (d) does not apply in my case. My only absence from IMO premises is from 19/07/93 to 23/07/93 when I suffered from influenza; a medical certificate was duly sent in. I have never had any unauthorized absence from IMO or failed to take up any duties which I have agreed with IMO to undertake. In my letter dated 30/06/93 (...) I clearly stated that I refused to take the post to which I was being transferred and gave my reasons for refusal therein. I also clearly explained to you verbally what I was expecting from IMO and that I was staying in room 110 while negotiations for a financial settlement with IMO or a post of a G-7 or G-6 category was offered to me."

In a memorandum dated 20 August 1993, the Applicant informed the Director of Administration that he would accept the post of Inventory Clerk, as of 1 September 1993, "as a temporary alternative ..."

On 13 September 1993, the Head, Personnel Section, informed the Applicant that "action has now been taken to effect recovery from your pay and allowances in respect of your unauthorized

absences from duty during July/August 1993. The recovery is to be spread over a period of three months." A Personnel Action form of the same date directed that recovery be made for absence from duty for the periods 1-16 July, 26-29 July and 1-31 August 1993.

On 1 September 1993, the Applicant assumed the post of Inventory Clerk, Office of General Services.

On 3 September 1993, the Applicant requested the Director of Administration to confirm the decision to remove him from the post of Mail Clerk and appoint him to the post of Inventory Clerk. On the same date, he wrote to the Secretary-General, and lodged an appeal with the Joint Appeals Board (JAB). On 14 September 1993, the Applicant wrote to the Head, Personnel Section, requesting review of the decision to recover his July and August salary. He stated "I have been on IMO premises during the months of July and August ..." In a reply dated 17 September 1993, the Head, Personnel Section, confirmed that the deduction was based on the provisions of Staff Rule 105.1(d). On the same date, the Head, Personnel Section, informed the Applicant that the Secretary-General "had decided to maintain his decision to transfer you to the post of Inventory Clerk with effect from 1 July 1993."

On 12 October 1994, the JAB submitted its report to the Secretary-General. The JAB found that:

"1. [The Applicant's] appeal is against various actions that all appear to have had their origins in a scuffle that is alleged to have taken place between him and another staff member in December 1988. Although a Disciplinary Board considered the case, the results were not disclosed to [the Applicant]. Some months later he was told to move to another post. No action appears to have been taken against the other staff member.

2. It is well within the Staff Rules as stated by the Administration to transfer [the Applicant] as was done. However, the circumstances under which it was carried out created the impression that it was for reasons other than efficiency of services within the Organization. More prudence should have been shown.

3. Attempts were made during the next few years following that transfer to find a post for [the Applicant] which would be acceptable to him but without success.

4. [The Applicant] makes two claims. Claim (a) is that he be reinstated to his former post or that he be offered a new post as a G-7. It is not in the opinion of the Board that reinstatement would provide a long term solution and it does not see any justification for such a higher grade.

5. [The Applicant] expresses his willingness to accept voluntary redundancy as an alternative to the above. He stipulates a figure of £50,000. The Administration has already offered a package totalling around £20,000. In a recent memo [the Applicant] mentions the sum of £250,000 as a condition to accept voluntary redundancy. The Board does not agree with the proposal. The Board feels that the mere fact that any amount whatsoever was mentioned to [the Applicant] negates the points raised in the memo of Administration of 28 June 1994 that only after an 'agreed termination' that a sum of separation could be agreed. The Board notes that the principle of separation is accepted to both Administration and [the Applicant]. Only the amount is disputed.

6. In claim (b) [the Applicant] refers to the non-payment of his salary for July and August 1993. [The Applicant] maintains that he was not absent from the building ([the Applicant] claims he was called by and met Mr. Barnard on 14 July 1993). However, the Board notes that he was absent on sick leave from 19 July to 23 July and, providing the relevant medical evidence can be produced, recommends that payment for this period be made. The Board cannot put forward an opinion as for the rest of the period since it cannot satisfy itself with whether [the Applicant] was present or absent during that period.

7. Under the circumstances the Board strongly believes that [the Applicant] could not continue to be gainfully employed and some form of separation should be negotiated to save him and the Organization further aggravation. In view of the time that has elapsed since this matter began, the Board feels that a figure closer to the £50,000 claimed than the £20,000 originally offered might be appropriate."

On 21 November 1994, the Secretary-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"You will note that the JAB found that the transfer of your post was well within my competence and that the JAB does not support you in your other claims.

Finally, I can confirm that my decision regarding the recovery of your salary, for the months of July and August 1993, stands."

On 28 February 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was improperly removed from his post.
2. The Applicant was falsely accused of hitting another staff member. Although a Disciplinary Board was convened, its decision was never disclosed to the Applicant.
3. The Applicant was improperly charged for unauthorized absence when in fact he was not absent from the IMO premises.

Whereas the Respondent's principal contentions are:

1. The proceedings of the Joint Disciplinary Committee are irrelevant and immaterial to the Applicant's claim.
2. The decision to transfer the Applicant in 1989 is not properly raised before the Tribunal as the Applicant failed to observe the time limits for appeal.
3. The decision to transfer the Applicant to the post of Inventory Clerk in July 1993 is the only matter properly before the Tribunal. This decision was a lawful exercise of authority in the interest of the service and the proper functioning of the Organization.
4. The Applicant was entitled to no salary for periods of unauthorized absence from duty.

The Tribunal, having deliberated from 3 July to 2 August 1996, now pronounces the following judgement:

I. The decision appealed is that of transferring the Applicant from his post of Mailing Clerk in the Central Registry, and in temporarily assigning him to various posts in the TCD Registry, eventually transferring him to the post of Inventory Clerk in the Office of General Services.

The Respondent contends that the transfer of the Applicant to the post of Inventory Clerk, in June 1993, is the only decision properly before the Tribunal. In the view of the Tribunal, however, the employment history of the Applicant provides the backdrop against which the transfer was implemented.

II. The Applicant claims that his initial temporary re-assignment was related to an altercation which allegedly took place with his supervisor in December 1988. He contends that this re-assignment constituted a disciplinary sanction which was imposed unlawfully. The record indicates that the reason for the Applicant's temporary re-assignment was in some way related to the alleged altercation, but the Respondent contends that it was not a disciplinary measure. In a letter, dated 18 February 1992, the Secretary-General characterized the transfer as "a necessary administrative arrangement" that was made to ensure that the parties involved in the matter no longer worked in the same office.

III. It is well established that the Secretary-General may assign and re-assign staff members at his discretion, in the interest of the Organization. As it appears that the Applicant was not demoted, and that there was no loss in salary, the Tribunal accepts the Respondent's contention that the re-assignment of the Applicant was not, in fact, a disciplinary measure. It finds that it was a reasonable exercise of the Respondent's discretion. Consequently, the Tribunal also accepts the Respondent's contention that deliberations relating to the December 1988 incident are not relevant to this proceeding.

IV. The Applicant also claims reimbursement of the amounts deducted by the Respondent for his unauthorized absence from work, in July and August 1993. The Applicant apparently, was in the building, but, intentionally, did not go to the office to which he had been assigned. The Tribunal has examined Rule 105.1(d) and finds that the Respondent's application of this provision governing "absence from duty" is a reasonable interpretation of the rule in the circumstances. The Applicant's mere presence on the premises of the Organization does not preclude his "absence from duty". The Applicant himself acknowledges his absence from the duties to which he had been assigned. The Applicant has the right to appeal decisions of the Respondent with which he is unhappy, but he does not have the right to unilaterally refuse to discharge duties assigned to him in the interest of the Organization. The Respondent's action in deducting his salary was fitting and within the scope of the applicable rules.

V. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Luis de POSADAS MONTERO  
Vice-President, presiding

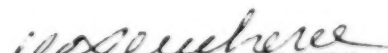


Mikuin Leliel BALANDA  
Member



Mayer GABAY  
Member

Geneva, 2 August 1996

  
R. Maria VICIEN-MILBURN  
Executive Secretary